IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21/02/2003

CORAM

THE HONOURABLE MR.JUSTICE K.GNANAPRAKASAM

SA.No.680 of 1990

Venugopal ... Appellant

-Vs-

1.Chandrakasa Padayachi (deceased)
2.Dhanraj
3.Chidambaranathan
4.Rajadurai
5.Panneerselvam
6.Pasupadam
7.Rosappoo ... Respondents

For Appellant: Mr.K.Venkatapathy, SC,
for Mr.R.Sivaram Karthik

For Respondents: Mr.R.Nandakumar

Appeal filed against the judgement and decree, dated 15.11.1989 and made in AS.No.21 of 1988, on the file of the learned Subordinate Judge of Kumbakonam, confirming the judgement and decree, dated 18.12.198 7 and made in OS.No.423 of 1984, on the file of the District Munsif of Kumbakonam.

:JUDGEMENT

1.The defendant is the appellant.
2.The brief facts of the plaintiff's case are as follows:-
The suit property is a village samudayam land and there are 50 pattadars to the suit property. The plaintiff's paternal grand father, Saminatha Padayachi was one among the 50 pattadars. A suit in OS.No.68/1932 was filed by 28 pattadars, against the remaining pattadars for partition, in respect of the suit land, among other properties, in which the plaintiff's grand father was the 3rd defendant. The suit property was shown as item 16 in Schedule-A and the said suit was compromised and a final decree was passed, in respect of items 1 to 15 and leaving the rest of the property as common properties, to be enjoyed by the pattadars in common. The intention of the pattadars for retention of the suit property was, for the use of the temple, viz. Droupathi Amman Temple, which is situated in a portion of the suit property. As the suit property is a village samudayam land, all the pattadars are co-owners and no division of the property took place. The defendant had purchased the

undivided share of some pattadars and on the strength of the said purchase, the defendant had put up walls on the southern portion of the suit property and the same was protested by the plaintiff and despite that, the defendant put up the construction and also declared that he is going to construct a rice mill building in the suit property. In the said circumstances, the plaintiff has instituted the suit for mandatory injunction for the demolition of the construction put up by the defendant in the suit property.

3.The defendant, in his written statement, admitted that the suit property is a samudayam property. The defendant also admitted about the suit in OS.No.68/1932, before the District Munsif Court, Kumbakonam, but, however, denied that the suit property was not set apart for the use of the Droupathi Amman Temple. The defendant claims that he had purchased 22 cents from Doraisamy Iyer and Krishnamoorthy Iyer under the sale deeds dated 13.5.1983 and also entered into an agreement to purchase 0.05 cents from one Sundararaman. Thus, the defendant claims that he is in possession of 27 cents of land. The defendant further stated that after purchase, he has applied for sub division of the land and the same was sub divided by the proceedings dated 24.6.19 83, passed by the Tahsildar, Kumbakonam. The defendant contends that by virtue of the said sub division, he became entitled to the separate property. The defendant also applied for the licence to the Government of Tamil Nadu for the construction of a rice mill and the authorities have sanctioned permission for the construction of a rice mill in the suit property and he had also constructed a rice mill upto the roof level and could not proceed further, due to the suit and therefore, prayed for the dismissal of the suit.

4.Based upon the above said pleadings, the trial court framed necessary issues and the plaintiff examined himself as PW.1 and also examined one more witness and marked Exs.A1 to A10. The defendant examined himself as DW.1 and also examined 3 more witnesses and marked Exs.B1 to B12. The trial court, after taking into consideration both the oral and documentary evidence, accepted the case of the plaintiff and decreed the suit and the same was confirmed in the appeal preferred by the defendant in AS.No.21/1988,before the Sub Court, Kumbakonam. Aggrieved by the same, the defendant has preferred this appeal.

5.Heard both sides.

6.The suit property is a village samudayam land, that there are 50 pattadars for the suit land and the plaintiff's predecessor was one among them and the suit property among other properties were the subject matter of an earlier suit in OS.No.68/1932, in which a final decree was passed on 29.7.1936, excluding the suit property and that the plaintiff's predecessor Saminatha Padayachi was a party to the said suit, are not in dispute. The plaintiff is also one of the sharers in the suit property, is also not disputed.

7.The defendant had purchased undivided shares of certain persons in the suit property, under Exs.B1 and B2 and also entered into an agreement to purchase the share of one Sundararaman under Ex.B4. It is the case of the defendant that only in the said property, he made arrangements to put up construction and the same was objected to by the plaintiff.

8.Now, the question is, whether the defendant, who had purchased undivided share in the suit property, is entitled to put up a construction?

9.The learned advocate for the appellant would contend that pursuant to the purchase, the defendant applied for sub division and as a matter of fact, the property was sub divided by the proceedings dated 24.6.1983, passed by the

Tahsildar, Kumbakonam and the same was not objected to by the plaintiff and that therefore, it has become final and the defendant is entitled to put up construction in the sub divided property and the same cannot be questioned by the plaintiff.

10.The appellant also relied upon certain provisions, viz. Sections 9 , 11, 12, 12A, 13 and 14 of the Tamil Nadu Survey and Boundaries Act (VIII of 1923). This act intended to survey of lands and settlement of boundary disputes. Section 9 deals with power of survey officer to determine and record an undisputed boundary, which states, "(1) The survey officer shall have power to determine and record as undisputed any boundary in respect of which no dispute is brought to his notice. Notice to registered holders of lands affected (2) Notice of every decision of the survey officer under Section 9(1) shall be given in the prescribed manner to the registered holders of the lands the boundaries of which may be affected by the decision." This Section is intended to determine the undisputed boundaries. Even for that purpose, it is mandatory that Notice of every decision of the survey officer should be given to the holders of the lands, the boundaries of which may be affected by the decision. There is nothing on record to show that such a notice has been issued to the plaintiff or to the other sharers, co-owners in the suit property.

11.Section 11 of the Tamil Nadu Survey and Boundaries Act, 1923 deals with appeals against orders under Section 9 or 10. Section 12 prescribes the time limit for preferring appeal and Section 12(a) deals with second appeal and 12(b) deals with revision and Section 13 deals with completion of demarcation and notification thereof and Section 1 4 deals with institution of a suit in civil court, which states, " Any person deeming himself aggrieved by the determination of any boundary under Section 9, 10, 11, 12A or 12B may, subject to the provisions of Parts II and III of the Indian Limitation Act, 1963, (Central Act 36 of 1963) institute a suit within three years from the date of the notification under Section 13 to set asi de or modify the said determination and the survey shall, if necessary, be altered in accordance with the final decree in the suit and the alteration, if any, shall be noted in the record. The plaintiff in such suit shall join as parties to it all persons whom he has reason to believe to be interested in the boundary which is the subject of suit."

12.A conjoined reading of all these sections would reveal that these sections are in respect of fixing of the boundaries of the undisputed boundaries. In the present case, the boundaries were not given in the sale deeds in favour of the appellants and as such the fixing of boundaries did not at all arise.

13.It is further argued that the plaintiff owns only a negligible share and therefore, the suit for mandatory injunction is not sustainable. The grant of mandatory injunction is only a discretionary in character and it could be granted only where the injury said to have been caused cannot be adequately compensated in terms of money or the circumstances were such that the order of removal is essentially required, for which, he relied upon the case of Deo Nandan (deceased by LRs) Vs. Chhote (AIR-1983-Allahabad-9).

14.The appellant also relied upon the case of Jagabandhu Kundu and others Vs. Rajmohan Pal and others (1925-Calcutta-538(2)), wherein it was held, "It requires a strong case for a court to refuse an injunction restraining a further alteration of the character of the property; but, in the case of mandatory injunction to restore to its original condition, that is always a

most exceptional remedy and one never to be applied except with the greatest saf eguard for the prevention of waste as well as injustice." The facts in the said case are entirely different. In fact, in the said case, the court speaks about the mandatory injunction to restore to its original condition and the said relief is most exceptional remedy and usually that would not be granted.
15.On the contrary, the learned advocate for the respondents has submitted that both the courts below have concurrently held on facts that the plaintiff is entitled to the relief and the same cannot be interfered with, unless it is warranted by compelling reasons and relied upon the decisions rendered in the case of Navaneethammal Vs. Arjuna Chetty (1997-I-CTC-172), wherein, in para 11, it was observed, "This Court, time without number, pointed out that interference with the concurrent findings of the courts below by the High Court under Section 100 CPC must be avoided unless warranted by compelling reasons. In any case, the High Court is not expected to re-appreciate the evidence just to replace the findings of the lower courts."
16.As it has already been observed that the suit property is a samudayam land belonging to the plaintiff and to the other pattadars, all of them are co-owners and in possession and enjoyment. The defendant had purchased the undivided share of certain persons. Now, the question is, whether the defendant could claim exclusive possession of the property purchased by him, based upon Exs.B1 to B5? Admittedly, the defendant had purchased only the undivided share of certain persons in the suit property and therefore, he has become a co-owner in the suit property. The right of the transfer by one co-owner is set forth in Section 44 of the Transfer of Property Act, which states, " Transfer by one co-owner: Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give, effect to the transfer, the transferor's right to joint poss ession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred.
Where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house."
17.This section is made applicable to the purchase of undivided share in the property owned jointly by several persons without any division or demarcation of their shares in the property. The defendant as a transferee acquires a right or share in the suit property and is entitled to be in joint possession of the suit property. The only remedy open to him to have a separate possession by way of enforcing an action for partition of the property and not otherwise. As the defendant had purchased only the undivided share in the suit property, he cannot have a sub-division, till the property is demarcated and earmarked in a suit for partition. If the purchase is in respect of already divided property, the position would be different. The transferee of a co-sharer acquires the rights of its transferor so far as is necessary to give effect to the transfer and no further.
18.The courts have held that the only course open to a co-owner in a property to enforce his right is to file a suit for partition and for the allotment of his share and he cannot by-pass the same, by getting it sub divided and that

too at the back of the plaintiff. In the said circumstances, I do not find any ground, which warrants interference with the decisions rendered by the courts below.

19.In the result, the second appeal is dismissed. No costs.

Index: Yes
Web: Yes

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To:

1.The Subordinate Judge of Kumbakonam
2.The District Munsif of Kumbakonam
3.The Record Keeper, VR Section, High Court, Madras

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